

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

ANTHONY KINARD, #157033,
Plaintiff(s),

CASE NO.: 2:05-CV-74131-DT

vs.

HON. PATRICK J. DUGGAN
MAG. JUDGE WALLACE CAPEL, JR.

JOHN S. RUBITSHIN, et. al.,
Defendant(s).

/

**ORDER GRANTING IN-PART DEFENDANTS' OBJECTION AND
MOTION TO STRIKE PLAINTIFF'S "SUPPLEMENTAL COMPLAINT"**

This matter is before the Court on the Defendants' Objection To Plaintiff's Affidavit In Opposition To Defendants' Motion To Dismiss And Motion To Strike Plaintiff's "Supplemental Complaint," filed on August 17, 2006, [D/E #46]. In support of its motion, the Defendants state that the Plaintiff in his response to the Defendants' currently pending motion to dismiss, has inserted into the response a Supplemental Complaint. The supplemental complaint appears to add new parties and also new incidents to his complaint that occurred prior to the filing of his original complaint. Further, Plaintiff has included grievance forms which were not included in his original complaint.

The Defendants are opposed to the inclusion of the supplemental complaint as well as the additional grievance forms. Defendants claim that in addition to being a procedural violation, the Plaintiff is attempting to cure his defective complaint through the submission of the supplemental complaint and grievances.

The filing of either an amended complaint or a supplemental complaint is not an automatic act. "A party may amend its complaint once as a matter of course at any time before a responsive

pleading is served....Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party." Rule 15(a), Federal Rules of Civil Procedure. Likewise, under Rule 15(d), Federal Rules of Civil Procedure, a party seeking to file a supplemental complaint must do so by way of written motion.

Having reviewed the Plaintiff's Affidavit In Opposition To Defendants Fed. R. Civ. P. 12(b)(6) Motion To Dismiss Affirmative Defense Of Failure To Exhaust Administrative Remedies, I find that the Plaintiff has attempted to supplement his complaint without first following the Federal Rules of Civil Procedure. Accordingly, the Plaintiff's Supplemental Complaint, which consists of pages 10-22 of his Affidavit In Opposition To Defendants Fed. R.Civ.P. 12(b)(6) Motion to Dismiss Affirmative Defense Of Failure To Exhaust Administrative Remedies, filed on August 10, 2006, [D/E #43], shall be, and is hereby **STRICKEN**. Those pages of his affidavit shall not be considered by the Court in deciding this matter.

The Defendant has also raised the issue of additional grievance forms which the Plaintiff has submitted along with his affidavit in opposition the Defendants' motion to dismiss. Having reviewed the grievances, the undersigned finds that while they should have been submitted at the time of the filing of the Plaintiff's complaint, the grievances shall be considered by this Court and not stricken from the record.

Accordingly, the Defendants' objection to affidavit and motion to strike Plaintiff's supplemental complaint is hereby **GRANTED IN-PART, AND DENIED IN-PART**.

IT IS SO ORDERED.

The parties are hereby informed that any objection to this order must be filed with the district court within 10 days after service, pursuant to Rule 72(a), Federal Rules of Civil Procedure.

DATED: September 15, 2006

s/ Wallace Capel, Jr.

WALLACE CAPEL, JR.

United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2006 , I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send electronic notification of such filing to the following: Diane M. Smith, Esq. , and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant(s) Anthony Kinard, #157033, Chippewa Correctional Facility, 4269 West M-80, Kincheloe, MI 49784

s/James P. Peltier

James P. Peltier

Courtroom Deputy Clerk

U.S. District Court

600 Church St.

Flint, MI 48502

810-341-7850

pete_peltier@mied.uscourts.gov